

NOV - 9 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In re Applications of)	MM DOCKET NO. 93-88
)	
EZ COMMUNICATIONS, INC.)	File No. BRH-910401C2
)	
For Renewal of License of)	
Station WBZZ (FM),)	
Pittsburgh, Pennsylvania)	
)	
ALLEGHENY COMMUNICATIONS)	
GROUP, INC.)	File No. BPH-910628MC
)	
For Construction Permit for a)	
New FM Broadcast Station)	
Pittsburgh, Pennsylvania)	

To: Administrative Law Judge
 Edward Luton

MASS MEDIA BUREAU'S OPPOSITION
TO MOTION TO ENLARGE ISSUES

1. On October 27, 1993, EZ Communications, Inc. ("EZ") filed a motion to enlarge the issues against Allegheny Communications Group, Inc. ("Allegheny") to add the following issues:

To determine whether Allegheny Communications Group, Inc. abused the Commission's processes by filing, despite its lack of status as a party in interest, a Petition to Deny the application for Commission consent to the assignment of radio station WQKB to EZ Pittsburgh, Inc., in which Allegheny falsely claimed that its allegations had never been resolved by the Commission.

To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Allegheny is qualified to become a Commission licensee.

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The Mass Media Bureau opposes EZ's motion, and we submit the following comments.

2. EZ alleges that Allegheny has abused the Commission's processes by filing a Petition to Deny an assignment application in which a subsidiary of EZ is the assignee. At the outset, EZ maintains that the Petition to Deny does not mention that the allegations were considered and rejected in the Hearing Designation Order in the instant proceeding, 8 FCC Rcd 2448 (MMB 1993) ("HDO"). Instead, the Petition to Deny includes the following statement:

To date the Commission has failed to consider the impact of this flagrant case on the qualifications of EZ, but the statutory requirements relating to the consideration of this assignment application compel consideration of this serious matter at this time.

Petition to Deny, Attachment A to Motion, at p. 6.

3. We note that EZ does not request a misrepresentation issue per se on the above facts. In any case, the Bureau does not believe that these facts warrant further inquiry as to a possible misrepresentation. The HDO was adopted by the Chief, Audio Services Division, acting pursuant to delegated authority. As EZ points out, Allegheny has filed an application

for Commission review of the HDO and the application for review has not been acted on¹. Thus, technically, the Commission itself has not yet acted upon the allegations rejected by the Bureau in the HDO.² Notwithstanding EZ's (and the Bureau's) opinion regarding the validity of the HDO and of Allegheny's application for review, the fact remains that Allegheny is seeking, and awaiting, Commission review of the allegations. The burden of making a prima facie case of willful deception is EZ's, and EZ has not shown that Allegheny intended to conceal any fact from the Commission. See Scott and Davis Enterprises, Inc., 88 FCC 2d 1090, 1099, 1100 (Rev. Bd. 1982).

4. EZ alleges that Allegheny's Petition to Deny "serves no legitimate purpose at all, and is simply dilatory and obstructionist." Motion at p. 3. In determining whether a petition to deny has been filed for the primary purpose of delay, the Commission will look at the following factors:

- (1) statements by principals or officers admitting an obstructive purpose;
- (2) the withholding of information relevant to a determination of the issues raised;
- (3) the absence of any reasonable basis for the allegations raised in the petition to deny;

¹ The application for review and associated motion for leave to file were filed on May 10, 1993. The Bureau filed its opposition on May 19, 1993.

² Although the Bureau, in issuing the HDO does so "with the full power of the Commission," the Commission itself may review the Bureau's action. Anax Broadcasting, Inc., 87 FCC 2d 483, 486 (1981).

(4) economic motivation indicating a delaying purpose; and

(5) other conduct.

PZ Entertainment Partnership, L.P., 6 FCC Rcd 1240 (1991), recon. denied 7 FCC Rcd 2696 (1992).

5. Here, EZ has pointed to no statement or other conduct suggesting an obstructive purpose, and no motivation, economic or otherwise, to indicate delay as a purpose. Allegheny has not withheld relevant factual information, and, although we disagree with Allegheny on the merits of its allegations, it cannot be said that they are without "any reasonable basis" whatsoever.

6. Indeed, EZ's insistence that Allegheny's Petition to Deny can have no purpose other than delay is pure speculation. EZ's reliance on its belief that Allegheny lacks standing to file the Petition is unavailing. Allegheny argues the contrary in the Petition. Thus, the question is, at least at this point, a matter of opinion.

7. While expressing concern about abuses of its processes, the Commission has stated that it "cannot discourage legitimate pleadings, however, even where the merits of the arguments they raise are not persuasive, absent a strong showing that delay is the movant's primary and substantial purpose." Dubuque TV Limited Partnership, 4 FCC Rcd 1999, 2000 (1989) (emphasis in

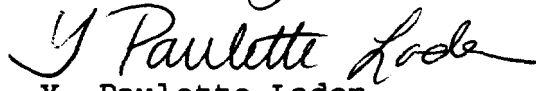
original). EZ has not made the required showing.

8. For the reasons set forth in the foregoing comments, the Bureau opposes EZ's Motion to Enlarge Issues.

Respectfully submitted,
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November 9, 1993

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch Mass Media Bureau, certifies that she has, on this 9th day of November, 1993, sent by regular United States mail, U.S. Government frank, copies of the foregoing "**Mass Media Bureau's Opposition to Motion to Enlarge Issues**" to:

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